come withholding actions and for renewed attempts to enforce support after initial efforts are unsuccessful. Under the new regulations "as long as some amount [of child support] is collected as a result of enforcement actions within the audit period, credit [for taking appropriate action] will be allowed regardless of whether time frames are met." *Id.*, 59 Fed. Reg. 66204, 66244-66245 (1994).

There are now four exceptions to the time frame requirements set by federal regulations. 45 C.F.R. §§305.20 (a) (4) (i)-(iv) (1994). These four broad exceptions to strict substantial compliance establish that federal funds are not unambiguously conditioned upon strict substantial compliance with time frames. The substantial compliance determination under the new Part 305 regulations are now so intertwined with exceptions that OSCE alone has the ability to determine whether a State is in substantial compliance. There are numerous reasons why a court will not be able to adequately enforce the new regulations.

First, Congress expressly delegated to the Secretary of HHS the ability to define "substantial compliance" regarding Title IV-D. 42 U.S.C. §652 (1996). *See also State of Ohio, DHS v. Sullivan*, 789 F. Supp. 1395, 1403 (S.D. Ohio 1992). Under the regulations promulgated in 1994, there is no longer a precise level of compliance that a State program must reach in order to receive federal funds. The time frame exceptions swallow many of the requirements. For example, if an enforcement technique is successful during the "audit period," a State will be considered to have taken appropriate action in the case regardless of whether time frames were met. 45 C.F.R. §305.20 (a) (4) (iv) (1994).

Second, there is no statutory guidance as to how a court should interpret the term "audit period." The term "audit period" is critical to each of the four ways States can receive credit for taking appropriate action notwithstanding time frames. However, nowhere in the statute or the regulations is the term "audit period" defined. For a court to enforce rights under Title IV-D, it would have to arbitrarily decide when an "audit period" would begin, how long the audit period would last, and when the audit period would end. "Audit period" is not defined anywhere in Title IV-D, just as "reasonable efforts" was not defined anywhere in Title IV-E. *See Suter v. Artist M.*, 503 U.S. 347, 359-60 (1992). *See also King v. Bradley*, 829 F. Supp. 989, 993-94 (N.D. Ill. 1993). Similarly, since the audit period used to determine substantial compliance is undefined, the new regulations are too amorphous for judicial enforcement. *See Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987).

Third, the Secretary of HHS makes her determination of substantial compliance based on examination of criteria that materially affect the ability of child support programs to achieve desired results. Child Support Enforcement Revisions of 1994, 59 Fed. Reg. 66204, 66212 (1994). After December 23, 1994, a determination of substantial compliance generally does not include an examination of criteria which more than 90% of States have satisfied. *Id.* This is because when more than 90% of the States are satisfying any given criterion, that criterion can be omitted from the determination of substantial compliance without materially affecting an audit's conclusion. *Id.* This materiality test further complicates the ability of the judiciary to determine whether a State

is meeting its contractual obligation to be in substantial compliance with Title IV-D.

If Congress indeed delegated authority to the Secretary to determine the dimension of IV-D rights by defining substantial compliance, then the concerns of the dissent in *Wright v. Roanoke*, would apply squarely to this case:

> I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

Wright v. Roanoke, 479 U.S. at 438 (O'Connor, J., dissenting) (emphasis original).

Congress did not intend to require the States to run perfect programs for all individuals who apply for IV-D services. Therefore, if Title IV-D creates an enforceable right, it is a unique and novel right, which can by definition only be litigated as a class action, and which might arguably require a State-wide class because of the State-wide operation requirements. 45 C.F.R. §305.21 (d) (1994). Such IV-D "rights" would not be created by Congress at all, but by the Secretary of HHS in the regulations defining substantial compliance, which could set any reasonable compliance level consistent with the statutes and their goals. This would entail a new group entitlement concept, vastly different from the property interest which every eligible beneficiary has in public assistance entitlements. This Court should be reluctant to find that Congress has created an entirely novel type of federal group entitlement without an unmistakable expression of such intent.

II.

THE COMPREHENSIVE INTERNAL ENFORCEMENT SCHEME OF TITLE IV-D ESTABLISHES A LEGISLATIVE INTENT TO FORECLOSE PRIVATE ACTIONS UNDER 42 U.S.C. §1983.

This case involves custodial parents' attempt to have the judiciary review the effectiveness of States' child support enforcement programs. Such a request would cause the judiciary to supplant the duties of the Secretary of HHS in overseeing the effectiveness of child support enforcement programs. Congress exclusively delegated these duties to the Secretary of HHS. 42 U.S.C. §652 (1996). These duties were never intended to be superseded by the judiciary through private §1983 enforcement actions.

This Court has repeatedly expressed great concern about the intrusion of the judiciary into the province of the legislative and executive branches. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992), the Court restated the lesson of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The judiciary must be mindful of the constitutional duties exclusively delegated to the other co-equal branches of government and take care not to breach those boundaries by assuming a position of authority over those co-equal branches of government. *Lujan*, 504 U.S. at 576-77.

In assessing whether the internal enforcement mechanisms of a complex federal legislative scheme are sufficiently comprehensive to demonstrate a congressional intent to preclude private §1983 action, the third factor of the private right of action analysis from *Cort v. Ash* and *Merrell Dow* is relevant: would private enforcement actions under §1983 further the underlying legislative

purposes, or would such private enforcement actions conflict with the internal enforcement mechanisms provided by Congress? *Cort v. Ash*, 422 U.S. at 78; *Merrell Dow*, 478 U.S. at 810-12.

The Finance Committee of the U.S. Senate, in the report reviewing the proposed 1984 amendments to IV-D, noted that the previous penalty provision, an automatic 5% reduction in federal AFDC payments after any OCSE finding of noncompliance, was inflexible. S. Rep. No. 98-387, 98th Cong., 2d Sess. 33 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2429. Due to this inflexibility,

> [a]pplication of this penalty has been repeatedly suspended by legislation on the basis that failure to suspend the penalty would penalize some States which actually had effective programs or which had made strong efforts to remedy the non-compliance.

Id.

Congress explicitly expected the triennial audits required by the 1984 amendments to be considerably more extensive than the previous annual audits, and to assess program effectiveness instead of simply checking for technical compliance with State plan requirements. Indeed, the regulatory scheme of 42 U.S.C. §603 (h) as written, and its legislative history, demonstrate that Congress wanted to encourage States to achieve compliance, and thus delegated discretion to the Secretary to approve corrective action periods and suspend reduction in IV-A payments while the State was making satisfactory progress toward substantial compliance.[11] The statute

[11] 42 U.S.C. §603 (h) (1996) places no limit on the length of the corrective action period which the Secretary may autho-
(continued...)

was written so as to exempt States which had brought their programs into compliance by the time OCSE actually issued a finding of noncompliance based on an audit, from any penalty, and to force States which had not voluntarily taken corrective action to do so or suffer loss of IV-A funds.

The IV-D penalty sanction is unlike other internal enforcement schemes which provide for withholding funds from entitlement programs. *See, e.g., Victorian v. Miller*, 813 F.2d 718, 723 (5th Cir. 1987) (*en banc*). The IV-D sanction is expressly tailored so it will *not* have an adverse impact on IV-D services. Further, Congress insisted States must lose IV-A AFDC funds if they fail to achieve substantial compliance in the IV-D program after a corrective action period.

> In view of the changes proposed in the Committee amendment, the penalty provisions of the law will apply only in cases where States not only fail substantially to carry out the requirements of law but also refuse to undertake the necessary changes to correct that situation. For this reason, the Committee cannot foresee any situation in which legislative action to suspend the revised penalties would be appropriate. Accordingly, the Committee would expect to oppose any such efforts to enact waiver legislation.

S. Rep. No. 98-387, 98th Cong., 2d Sess. 33 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2429.

A penalty is mandatory when the conditions of the penalty statute have been fulfilled. 42 U.S.C. §603 (h) (1)

[11] (...continued)
rize. The Secretary has placed a one-year limitation on corrective action periods by regulation. 45 C.F.R. §305.99 (c) (1994). The follow-up audit covers the first full quarter following the corrective action period. 45 C.F.R. §305.11 (1994).

(1996). The Secretary gives the State written notice of each IV-D requirement found substantially noncomplying, sets the amount of the penalty, and gives notice the penalty may be suspended for a period not to exceed one year, by approval of a corrective action plan submitted with 60 days of the penalty letter. 45 C.F.R. §305.99 (1994).

IV-A payments must be reduced between one and two percent after the first finding of substantial noncompliance, unless the penalty is suspended by approval of a corrective action plan. 42 U.S.C. §603 (h) (1) (1996). For a second consecutive finding of substantial noncompliance, IV-A payments must be reduced between two and three percent, and between three and five percent for a third or subsequent such finding. *Id.*

A corrective action plan must contain the steps necessary to achieve substantial compliance with IV-D requirements within the time period which the Secretary finds appropriate. 42 U.S.C. §603 (h) (2) (1996). There is no administrative appeal of the Secretary's decision to refuse approval of a corrective action plan. 45 C.F.R. §305.99 (1994). If OCSE decides that implementation of the proposed corrective action plan will achieve substantial compliance, and OCSE monitoring of the plan shows that it is being fully implemented and the State is progressing to achieve substantial compliance, the loss of IV-A funds will be suspended for a period not to exceed one year. 42 U.S.C. §603 (h) (2) (1996); 45 C.F.R. §305.99 (1994).

The penalty remains in effect until the Secretary has issued a finding of substantial compliance, despite suspension of the reduction in IV-A payments. During this period, OCSE not only monitors implementation of the

corrective action plan, it must audit all other aspects of the State IV-D program each year the penalty remains in effect. 42 U.S.C. §652 (a) (4) (1996). The monetary sanction is suspended until the Secretary finds that either: 1) the State is not implementing its corrective action plan; or 2) despite implementation of the plan, the State did not achieve substantial compliance, based on a follow-up audit covering the first fiscal quarter after the end of the corrective action period. 45 C.F.R. §305.99 (d) (1994). The OSCE finding of continued substantial noncompliance after a follow-up audit ends the suspension of the monetary sanction, subject to administrative appeal and judicial review. 42 U.S.C. §1316 (1996).

The internal enforcement scheme at issue in *Wright v. Roanoke* was functionally identical to the internal enforcement schemes found in all the entitlement programs of the Social Security Act: individual administrative hearings and federal compliance audits, with the authority to withhold program funds. *Wright v. Roanoke*, 479 U.S. at 428. Except for IV-D, the internal mechanisms for federal enforcement of the Social Security Act program requirements all consist of a general provision, with slight variations, which gives the Secretary authority to stop payment of all or some federal funds to States not complying with program requirements.[12] These mech-

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[12] For example, 42 U.S.C. §304 (1996) (Old-Age Assistance Grants); 42 U.S.C. §503 (b) (1996) (Unemployment Compensation) parallels the structure and procedure of 42 U.S.C. §304, with minor variations directed to this particular program. 42 U.S.C. §604 (a) (1996) is the Title IV-A general grant of authority to stop payment to State programs found to be out of compliance with federal standards by the Secretary. Like 42 U.S.C. §304, the cut in funds may be limited to the offending

(continued...)

anisms for HHS enforcement, like that of HUD at issue in *Wright v. Roanoke*, are in stark contrast to the comprehensive scheme in Title IV-D.

The Family Support Act of 1988 provided, or required the Secretary to provide, very specific remedies for the precise complaints which have been raised in this and every private §1983 action seeking to establish enforceable rights to IV-D services. The Secretary has adequately addressed the failure of State IV-D agencies to take any action on cases (especially paternity cases), and the long delays in taking action. *See Carelli v. Howser*, 923 F.2d 1208, 1215 (6th Cir. 1991); *Wehunt v. Ledbetter*, 875 F.2d 1558, 1561 (11th Cir. 1989). Congress in 1988 set additional paternity performance standards by statute, provided 90% federal funding for paternity testing, and directed the Secretary to set time limits for various IV-D activities. 42 U.S.C. §§652 (g), (h) & (i), and 655 (a) (1) (C) (1988). The legislation shows that Congress intended OCSE to enforce program standards, whether set by statute or regulation, as the remedy for the performance complaints which are the subject of this and similar private §1983 suits.

The comprehensive and vigorous federal enforcement of Title IV-D is reflected in the frequency of penalty notices and corrective action periods. OCSE enforcement has accurately identified the critical areas of IV-D noncompliance, and Congress has provided internal remedies, which OCSE is directed to administer and enforce. 42 U.S.C. §652 (1996).

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[12] (...continued)
parts of the State program. 42 U.S.C. §1204 (Aid to the Blind) recites the same enforcement procedures found in 42 U.S.C. §§304, 503 (b) and 604 (a).

Review of all the State and Territorial IV-D programs since 1975 has given OCSE expert knowledge of the special problems, many of them technical, which exist in the different IV-D programs, the operational and management structure of each program, and the widely varying support enforcement approaches used by each State, depending on State law and governmental organization.[13] Federal enforcement has not only been comprehensive and frequent, but also effective, especially considering the magnitude of the problem IV-D was designed to address. Most States have succeeded in achieving substantial compliance through a corrective action period, and national IV-D collections have increased steadily each year.[14] Congress recognized that national implementation of a network of automated systems, wage withholding, and interstate coordination are the keys to realizing the goals of IV-D. Individual lawsuits will not speed attainment of the tools that the States really need to improve child support enforcement.

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[13] OSCE publishes a "Compendium of State Best Practices" in order to facilitate the sharing of ideas on child support enforcement. A sampling of the best State practices can be found in OCSE's 1994 report to Congress. Child Support Enforcement Nineteenth Annual Report to Congress (1994), U.S. Department of HHS, Administration for Children and Families, OCSE, at pp. 8-10.

[14] Child Support Enforcement Nineteenth Annual Report to Congress (1994), U.S. Department of HHS, Administration for Children and Families, OCSE, at p. 29.

CONCLUSION

For the reasons stated in this brief and in the brief of the petitioner, amici respectfully urge this Court to reverse the decision of the court below.

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